STATE OF MICHIGAN

COURT OF APPEALS

FENWIN HOMEOWNERS ASSOCIATION,

Plaintiff/Counter-Defendant,

and

LAKE PARK VILLAGE ASSOCIATION and TIMBER RIDGE VILLAGE ASSOCIATION,

Plaintiffs/Counter-Defendants-Appellants,

v

LAKE PARK WATER COMPANY,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellee,

and

DENNIS SHAW and SPECTRUM MANAGEMENT,

Third-Party Defendants.

UNPUBLISHED
May 26, 2011

No. 297580
Genesee Circuit Court
LC No. 08-088588-CK

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Plaintiffs/counter-defendants-appellants, Lake Park Village Association and Timber Ridge Village Association ("LPVA" and "TRVA," respectively; collectively "appellants"), appeal as of right the order of the trial court denying their motion for reconsideration of the court's ruling in favor of defendant/counter-plaintiff/third-party plaintiff-appellant, Lake Park Water Company (defendant). After a bench trial on the issue of the ownership of portions of a water system operated by defendant, the trial court ruled that defendant owns the disputed water mains. Appellants now appeal that determination. We affirm the result reached by the trial court.

This case involves three developments, Fenwin, which consists of two planned subdivisions, and Lake Park Village (LPV) and Timber Ridge Village (TRV), which are condominium developments governed by similar documents. For purposes of this appeal, the issue in this case concerns the ownership of certain portions of a water distribution system or water supply system. In the trial court, plaintiffs/counter-defendants, Fenwin Homeowners Association (FHA), LPVA, and TRVA, contended that their co-owners (the individual property owners making up each association), owned all portions of the water system outside of a circular parcel of land that is undisputedly owned by defendant (referred to as the "isolation area"), with the exception of the original six-inch water main that extends from the isolation area to the Fenwin development. Defendant claimed ownership of all of the water mains and "leads." After a bench trial, the trial court ruled that defendant owns the water mains, but appellants' co-owners own the connections from the mains to the individual condominium units as "general common elements" under the LPV and TRV master deeds. The trial court reserved ruling on the connections within the Fenwin development, and FHA is not a party to this appeal. Appellants now appeal the trial court's determination that defendant owns the water mains. Defendant does not cross-appeal the trial court's ruling concerning ownership of the connections from the mains to the individual units. The trial court has stayed the proceedings in three lower court files, LC 08-88351-CK, LC No. 08-88588-CK (at issue here), and 09-92734-CK, pending the outcome of this appeal.

In their complaint, plaintiffs requested declaratory relief to quiet title to the "water distribution system."[1] A trial court's rulings in declaratory and quiet title actions are reviewed de novo, while its findings of fact are reviewed for clear error. *Toll Northville Ltd v Twp of Northville*, 480 Mich 6, 10; 743 NW2d 902 (2008); *Fowler v Doan*, 261 Mich App 595, 598; 683 NW2d 682 (2004). Issues of statutory construction and contract interpretation are also reviewed de novo as questions of law. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006); *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

Appellants argue that the trial court erred in rejecting their claim of ownership because the master deeds' provisions concerning the "common elements" conveyed the portion of the water system within LPV and TRV to their respective co-owners, and no subsequent document shows the transfer of any ownership interest in the components of the water distribution system to defendant. They argue that there is no evidence that defendant ever owned anything outside of the isolation area, and that, by maintaining the portions of the water distribution system outside the isolation area, defendant was merely carrying out its contractual obligations under its water supply agreements with appellants. We disagree.

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[1] Although defendant argued below that plaintiffs failed to state a claim under the quiet title statute, MCL 600.2932(1), because their claim did not involve an interest in land, the trial court stated during trial that it intended to resolve the ownership dispute, even if not on the theory originally pleaded, because a determination of ownership was necessary to resolve the other issues in this case.

Defendant acquired the "water supply system," as it then existed, by virtue of a September 23, 1993, "Assignment of Water Supply System," under which then-owners Roy McGlothin and Claudine McGlothin (collectively, "McGlothin"), assigned defendant their interest in the system. The relevant language of the agreement is as follows:

> **WHEREAS**, McGlothin is currently the owner and operator of a certain *water supply system* located on land owned by McGlothin located in the Township of Mundy, County of Genesee, State of Michigan ("*Well*"); and
>
> **WHEREAS**, McGlothin is this day conveying said land to Lake Park Village, L.C., a Michigan limited liability company, which intended to develop same as a condominium; and
>
> **WHEREAS**, McGlothin has heretofore agreed that the ownership and maintenance of the Well shall be assigned to a corporation owned by David Cutsinger.
>
> **NOW, THEREFORE**, in consideration of the mutual covenants contained herein, the parties agree as follows:
>
> 1. McGlothin hereby assigns to Lake Park all of its rights and obligations relating to the Well and all of McGlothin's right, title and interest in and to any personal property located on the premises described in Exhibit A attached hereto, including a water well and all parts and machinery associated therewith, and all contracts for use of the water from such Well, subject to the terms and conditions contained herein.

Appellants acknowledge that this agreement assigned to defendant McGlothin's interest in the "water system" as it existed on September 23, 1993—that is, the well, pump, and equipment in the isolation area, *and the six-inch water main running from the isolation area to Fenwin*. They make a distinction, however, between this original water system, and the water mains that were subsequently constructed. They claim that the master deeds designate the subsequently-constructed "water distribution system"—including the water mains—within each condominium development as a general common element. The LPV master deed provides as follows:

> The General Common Elements are:
>
> * * *
>
> (e) Water. The water distribution system throughout the Project, including that contained within the Unit walls, up to the point of connection with plumbing fixtures within any Unit.
>
> * * *
>
> Some or all of the utility lines, systems (including mains and service leads) and equipment and the water system described above may be owned by the

> local public authority or by the company that is providing the pertinent service. Accordingly, such utility lines, systems and equipment, and the water system, shall be General Common Elements only to the extent of the Co-owners' interest therein, if any, and the Developer makes no warranty whatever with respect to the nature or extent of such interest, if any.

The TRV master deed contains language that is identical in substance. Accordingly, by virtue of the second paragraph quoted above (to which the parties and the trial court refer as the "carve out"), the LPV and TRV master deeds do not designate any equipment "owned by the local public authority or by the company that is providing the pertinent service" as a general common element. Because it is undisputed that defendant owns the water system as it existed in September 1993, and, as demonstrated, *infra*, the subsequent documents suggest that defendant was intended to, and did, continue to own the system as it expanded to include additional water mains, the most plausible interpretation is that, under the master deeds, appellants' co-owners own, as a general common element, "customer site piping," MCL 325.1002(f), but do not own the water mains. This gives meaning to both the "water" component of the general common elements provisions of the master deeds, and the apparent contemporaneous understanding that defendant was to continue to own the water system as it expanded to include additional water mains.

The relevant documents subsequent to the 1993 assignment of the water supply system to defendant show that defendant was considered the owner, as well as the operator, of the water system, as it expanded to include additional water mains. These documents fail to demonstrate appellants' claimed division of ownership between the well, pumps, and original water main, and the subsequently-constructed water mains. The LPV water supply agreement, which was executed just under a month after the LPV master deed, provides that:

> WHEREAS, the Water Company is the owner and operator of the community well water supply system which will serve the Condominium (the "Well System").
>
> * * *
>
> NOW, THEREFORE, in consideration of the mutual promises, the parties hereto agree as follows:
>
> * * *
>
> 2. The Water Company shall at all times during which it is the owner of the Well System, maintain the water supply system in good repair and condition . . .

Absent from this document is any reference to a "water distribution system," which defendant would not *own* but would be required to *maintain*. It is true that paragraph two refers to defendant as the "*owner* of the *Well System*," but provides that defendant "shall *maintain* the *water supply system*." By its own terms, however, the agreement uses "Well System" and "community well water supply system" interchangeably. It is implausible that "community well water supply system" would be used to mean something different than "water supply system." Appellants' interpretation might be plausible if the water supply agreements referred to

defendant as the "owner of the Well System" but required it to *maintain* the "water distribution system" owned by appellants' co-owners. As they are written, however, the most plausible interpretation of the water supply agreements is that the system defendant *owns* and the system it "shall *maintain*" is the same.

Moreover, a 1994 Administrative Consent Order (ACO) entered by stipulation of the Michigan Department of Public Health (MDPH)[2] and defendant, both refers to defendant as the "owner and operator" of the "water supply system" previously owned by Roy McGlothin, and states that Lake Park Village, L.C., "developed the condominium project known as Lake Park Village *and [defendant] has developed plans to own and operate* the water supply system *which will serve Fenwin and Lake Park Village*." Thus, the 1994 ACO, dated just a few months after the December 1993 LPV master deed, specifically recognizes defendant as the owner of both the existing water system and the proposed, expanded water system that would serve LPV. While the parties agree that the MDPH/DEQ does not have the authority to determine ownership, if the distinction appellants claim had been intended, it would presumably be reflected somewhere in these documents. Instead, everyone involved appears to have been operating on the assumption that defendant would own and operate the expanded water supply system in the same manner as it owned and operated the existing water system after the 1993 assignment. It appears to have been assumed and understood that the subsequently-constructed water mains would simply be incorporated into the existing water system.

The trial testimony of David Cutsinger, the individual behind both of the condominium developers (Lake Park Village, L.C., and Timber Ridge Village, L.L.C.), defendant water company, and construction company D & C Builders, also supports this conclusion. Cutsinger testified that he had someone design the water distribution system for LPV and TRV, and that when he designed the system and entered into the water supply agreements, he had no intention of plaintiff associations co-owning any part of the water distribution system. Asked whether he had any documents to show that the defendant purchased the water mains from Lake Park Village, L.C., or Timber Ridge Village, L.L.C., Cutsinger replied:

> they wouldn't have purchased water mains. D & C would have been the contractor. Lake Park Water Company wasn't a construction company. D & C Builders bought the water mains, and paid for the installation, and permits, *and everything they had to do to install them for Lake Park Water Company*. [Emphasis added.]

Cutsinger did not, however, have records dating back 16 or 17 years that would show whether defendant hired D & C Builders to do that work.

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[2] By Executive Reorganization Order No. 1996-1, effective April 1, 1996, the functions of Director of the Michigan Department of Public Health (MDPH), were transferred to the Director of the Department of Environmental Quality (DEQ). MCL 330.3101(V).

While one might question Cutsinger's credibility because of his position as president of defendant water company, the testimony of civil engineer John Ledy, who has no apparent interest in the outcome of this ownership dispute, also reflects an understanding that defendant was to own *and* operate the water system. Ledy testified that he took over all aspects of the design of LPV, including the sewers and water mains, late in the project, and that he designed both phases of TRV. He worked on the exhibits to the master deeds. Based on the representations of the developers and contractors, Ledy understood "Water for the project is by a private community well system, which is owned by Lake Park Water Company," in the utility plans for TRV, to mean that "the well system and water mains leading into Timber Ridge were owned and operated by Lake Park Water Company."

Appellants contest the trial court's conclusion that that "the interplay between" the Safe Drinking Water Act (SDWA), MCL 325.1001 *et seq*., and *Lake States Associates, Inc v Michigan*, 115 Mich App 752; 321 NW2d 801 (1982), "mean[s] that a public supplier of water must retain ownership of those facilities subject to the regulatory authority of the DEQ." The trial court ruled that some combination of *Lake States*, 115 Mich App at 752, and the SDWA prevented the master deeds in this case from designating the water mains as general common elements, even though they purported to do so. We agree with appellants that the trial court erred in so holding. Appellants are correct that *Lake States* addressed the MDPH's *jurisdiction* over the plaintiff developer (who was not a water supplier) and a part of the piping system on the plaintiff's property (the parties did not dispute the MDPH's jurisdiction over the water main). *Id*. at 755. Under the SDWA, a water "supplier" means "a person who owns *or operates* a public water supply." MCL 325.1002(t) (emphasis added.) Contrary to the ruling of the trial court, *Lake States* did not address whether water mains must be owned, as opposed to merely operated, by a water supplier, or whether a developer may transfer ownership of water mains to individuals or entities that are not suppliers of water. In addition, *Lake States* is not binding because it was decided in 1982.[3] We agree with the trial court that the water mains are not general common elements owned by appellants' co-owners under the master deeds, but conclude that this is so based on the "carve out" and the other relevant documents, rather than because the SDWA or *Lake States*, 115 Mich App at 752, prohibits such a transfer.

Appellants also argue that the trial court's interpretation of the SDWA renders meaningless provisions of the Condominium Act pertaining to designation of general common elements, and, in particular, MCL 559.163, which provides that "Each co-owner has an exclusive right to his condominium unit and has such rights to share with other co-owners the common elements of the condominium project as are designated by the master deed." As noted, we affirm the result of the trial court on a different basis. See *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007) ("[W]e will not reverse if the right result is reached, albeit for the wrong reason.")

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[3] A Court of Appeals opinion issued before November 1, 1990, is not binding on a subsequent panel of the Court of Appeals. MCR 7.215(J)(1).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Pat M. Donofrio